BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

Joint Application of AMERICAN AIRLINES, INC. and BRITISH AIRWAYS PLC under 49 USC 41308 and 41309 for approval of and antitrust immunity for agreement	:	Docket OST-2001-10387
Joint Application of AMERICAN AIRLINES, INC. and BRITISH AIRWAYS PLC under CFR Part 212 for statements of authorization (blanket codesharing) and under 49 USC 40109 for related exemption authority	:	Docket OST-2001-10388

ANSWER OF
CONTINENTAL AIRLINES, INC.

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Northwest[1] has sought an extension of 120 days for submission of answers to the American/British Airways applications for antitrust immunity and codeshare authority, the minimum necessary to satisfy due process requirements if the Department does not grant Continental's motion to dismiss the American/British Airways application pending resolution of the critical outstanding issue: open access

[1] Common names are used for airlines.

at London Heathrow and London Gatwick. As Continental, Delta, Northwest and Virgin Atlantic have demonstrated, the Department should not again waste its own resources and those of numerous interested parties to consider antitrust immunity and codesharing authority for American and British Airways without being assured that access at London Heathrow and London Gatwick will be truly open. Any action either denying the parties their due process right to adequate time for reviewing confidential documents and preparing their own evidence or continuing a proceeding lacking the critical predicate for further consideration of the American/British Airways application – open entry at London Heathrow and Gatwick – would be arbitrary, capricious and an abuse of discretion.

Continental states as follows in support of Northwest's motion.

1. Although American and British Airways have responded to the Continental and Northwest motions arguing that Continental, Delta and Northwest are "attempting to frustrate bilateral efforts to achieve a U.S.-U.K.. open skies agreement," nothing could be further from the truth. Continental has always supported a U.S.-U.K. agreement truly opening the skies between the U.S. and London's Heathrow and Gatwick airports. American and British Airways have not. Since the skies are already open between the U.S. and all U.K. airports other than London Heathrow and Gatwick, open skies without open airports at London Heathrow and Gatwick would be meaningless. Although American and British Airways abandoned their previous attempt to secure immunity from the antitrust laws as a result of proposals which would have required only a minimal opening of

London Heathrow and have steadfastly refused to offer slots for other carriers as part of their request for antitrust immunity, they now argue that the U.K. government will not agree to an unspecified "freeing up access to Heathrow" "without assurances that U.K. carriers will be given effective access to the U.S. domestic market" which would "only be available through immunized alliances with U.S. carriers." (American/British Airways Answer herein, September 7, 2001 at 2 (emphasis added)) Since British Airways already has access to U.S. gateways generating over 80% of the U.S.-U.K. traffic, the U.K. request for "effective access to U.S. domestic markets" suggests that American and British Airways are seeking not only to dominate U.S.-London routes but also to provide British Airways with effective access to domestic U.S. traffic through its alliance with American. If so, even greater scrutiny of the American/British Airways applications and the 14 or 15 boxes of confidential documents they have submitted so far will be required.[2]

2. Just as the U.K. government has insisted on benefits for British Airways, the U.S. has insisted on "adequate provision for new and expanded U.S. carrier service through London airports, particularly Heathrow . . . notwithstanding the constraints at Heathrow." (Order 99-7-22 at 2) Indeed, U.S. officials have said, "But even for us to begin to consider an alliance which includes antitrust immunity will absolutely require a full 'open skies' agreement and more. I say more because

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[2] To the extent British Airways is seeking "access to the U.S. domestic market," the scope of the British Airways/American document search and

(continued...)

we need not only open skies de jure, but we need them de facto."[3] There is a sound policy reason for requiring open skies in fact before considering antitrust immunity applications: only in markets "fully open to new entry and operations – de jure (by reason of bilateral agreements) and de facto. . . can we be assured that immunity will be pro-competitive and pro-consumer, the touchstones of our immunity approach." (Order 96-5-38 at 13) This policy was abrogated when the Department considered the previous American/British Airways application for antitrust immunity with no assurance that London Heathrow and Gatwick would be opened. As Continental, Delta, Northwest and Virgin Atlantic have demonstrated, the results of that proceeding clearly demonstrate that the Department should not once

(…continued)

submission is too narrow since documents discussing competition in the domestic U.S. market have not been provided.

[3] Speech by Deputy Assistant Secretary Patrick Murphy to the American Association of Airport Executives, June 11, 1994, at 14.

again put the cart before the horse by considering an antitrust immunity application without assurances that the skies in London will be truly open.[4]

3. American and British Airways ask the Department to consider their extraordinarily complex and controversial application for immunity from the normal operation of the antitrust laws on routes they dominate between the U.S. and London quickly despite the total absence of any assurances that new entrants will have effective access to London Heathrow.[5] Although the Department has consistently required assurances that open access to foreign airports would be available before considering antitrust immunity applications, American and British Airways nonetheless ask the Department to ignore the impossibility of reviewing

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[4] Although truly open skies at London Heathrow and Gatwick are an essential prerequisite for consideration of an American/British Airways alliance, the Department has said, "it must be clearly understood that the existence of an open skies relationship in no way 'guarantees' any grant of immunity. To the contrary, it is entirely possible that immunity will not be found to be pro-competitive or pro-consumer in particular cases notwithstanding a fully open national market, depending on such factors as relevant market concentration, potential future barriers, overall dominance and size of the applicants and the like." (Order 96-5-38 at 13) Given the high concentration on U.S.-London Heathrow routes, current and future barriers to entry at London Heathrow and the overall dominance and size of American (the world's largest airline) and British Airways (the U.K.'s largest airline and by far the largest airline at Heathrow), any alliance between the two would be anti-competitive and anti-consumer.

[5] Now that United (the world's second largest airline) and bmi (the second largest airline at London Heathrow) have also sought antitrust immunity, the issue of antitrust immunity for U.S.-London routes has become even more complex and controversial. Clearly, the Department must consider both applications together, and rushing the parties to respond to the American/British Airways application before they have had an opportunity to consider fully the implications of the United/bmi application would further deny the parties the opportunity to respond fully to the American/British Airways application.

some 20,000 pages of documents by at least nine parties represented by 54 different attorneys and outside consultants in facilities which initially permitted only one person to review documents during the Department's normal business hours. Although the applicants have reluctantly provided some, but not all, of the indices normally required, other interested parties have not even had time to review all of the documents sufficiently to determine whether they agree with the Department's assessment that the record is complete. Twenty-eight days after their application was submitted, the applicants agreed to give other parties copies of their documents for review, the same access parties would normally have for far longer periods in litigation before the courts. Clearly, the short answer period available fails to give "all interested parties sufficient time to analyze adequately and comment fully on all material in the public and non-public record" (See the Department's August 27, 2001, Scheduling Notice at 2) Sacrificing due process rights to rush to judgment on an application lacking the single most critical predicate for granting it – truly open skies and airports at London – would surely be arbitrary, capricious and an abuse of discretion.

4. American and British Airways cite a commitment made by President Bush and Prime Minister Blair "to intensify our efforts to liberalize fully our bilateral civil aviation relationship," but efforts to "liberalize fully" the U.S.-U.K. bilateral aviation relationship may mean far less than the open skies and open airports at London Heathrow and Gatwick required for consideration of antitrust immunity for any dominant U.S.-U.K. alliance. Moreover, given the years of

unsuccessful government-to-government talks about opening London Heathrow and Gatwick, the fact that "U.S-U.K. government-to-government talks" excluding carriers from participation have been scheduled for October after Continental and Northwest pointed out that no talks had been scheduled provides no basis for concluding that access at London Heathrow and Gatwick will be opened soon. If American and British Airways themselves truly believed an agreement opening those airports would soon be reached, they would have no basis for objection to Continental's motion to dismiss their application or defer it pending such an agreement. Clearly, the applicants' objective is to secure antitrust immunity without truly opening London Heathrow and Gatwick. The Department must not be their ally – wittingly or unwittingly – in such a nefarious scheme.

For the foregoing reasons, Continental urges the Department to grant Continental's motion and dismiss the American/British Airways applications for antitrust immunity and codesharing authority without prejudice to resubmission if and when open access at London Heathrow and Gatwick has been assured, or,

failing that, to grant Northwest's motion for a 120-day extension of the date for answers to the American/British Airways applications.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on all parties served with the American/British Airways applications in accordance with the Department's Rules of Practice.

/s/ Thomas Newton Bolling

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September 10, 2001

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